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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In Re Bard IVC Filters Products
Liability Litigation

No. MD-15-02641-PHX-DGC

SHERR-UNA BOOKER, an individual,
Plaintiff,

v.

C.R. BARD, INC., a New Jersey
corporation and BARD PERIPHERAL
VASCULAR, an Arizona corporation,
Defendants.

**PLAINTIFF'S MOTION *IN LIMINE* #4
AND MEMORANDUM IN SUPPORT
TO EXCLUDE EVIDENCE THAT IVC
FILTERS ARE THE GOLD
STANDARD OR STANDARD OF
CARE TREATMENT**

(The Honorable David G. Campbell)

(Oral Argument Requested)

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE THAT IVC FILTERS ARE THE GOLD STANDARD OR
STANDARD OF CARE TREATMENT**

Plaintiff moves *in limine* for an Order precluding evidence and argument relating to any alleged reference to IVC filters as the gold standard treatment or standard of care for the treatment of pulmonary embolisms and/or deep vein thrombosis.

MEMORANDUM OF LAW

Plaintiff's claims involve Bard's G2 IVC blood filter. Based on prior witness questioning, Plaintiff anticipates that Bard may seek to introduce testimony or evidence that IVC filters are the "standard of care" or the "gold standard" for the treatment of

1 pulmonary embolisms (PE) or deep vein thrombosis (DVT), especially if the patient
2 cannot be treated with anticoagulation medication. The relevant issues are whether Bard's
3 design of the G2 filter was defective and whether Bard failed to provide adequate
4 warnings regarding the risks and complications of the G2 filter. Even if IVC filters
5 generally are the "gold standard" or "standard of care" for treatment with PE or DVT that
6 alleged fact does not make it more or less likely that Bard designed the G2 filter properly
7 or that its warnings were adequate.

8 Plaintiff further anticipates Bard will attempt to use these statements or testimony
9 to unfairly prejudice Plaintiff and her experts who disagree with the use of those terms or
10 the appropriate indications for IVC filters, generally. Plaintiff will be forced to respond,
11 creating a mini-trial over an issue that is entirely irrelevant and highly prejudicial to the
12 issues the jury must resolve. Fed. R. Evid. 402, 403. Additionally, to permit such
13 testimony would: (1) allow Bard to supplant the legal standard of care with its own
14 manufactured narrative of the "standard of care"; (2) place greater weight on the
15 effectiveness of IVC filters, including Bard products, compared to other proven
16 alternative medications, products or procedures; and (3) result in undue delay, confusion,
17 and prejudice without adding probative value. Fed. R. Evid. 403. For these reasons, any
18 of Bard's "gold standard" or "standard of care" evidence relating to the use of IVC filters
19 should be excluded.

20 First, admission of such unsupported testimony would enable Bard to supplant its
21 own "standard of care" for the applicable legal standard without the scrutiny of a *Daubert*
22 analysis which is otherwise required for the admissibility of scientific evidence on the
23 standard of care. This testimony or argument will confuse the jury and will undermine
24 the Court's responsibility to determine the applicable law and charges to the jury.
25 Admission of such evidence creates a substantial risk that jurors will confuse Bard's
26 assertion that its products represent a "gold standard" or "standard of care," with the
27 actual legal standard of care which Bard was obligated to follow in regard to its products.
28

1 Such evidence will allow jury to make impermissible and unsupported legal conclusions
2 based on an ambiguous and factually deficient terms touted by Bard to describe its filters.

3 In addition, Bard's "gold standard" narrative would result in greater weight being
4 unduly accorded to the use and effectiveness of its IVC filters. If jurors hear that
5 products like the G2 Filter are similar to a "gold standard," they are likely to improperly
6 place a greater weight upon the product's use and effectiveness. Such a term suggests that
7 no alternative products or procedures existed to treat Ms. Booker's condition or potential
8 condition, or that if there were alternatives that Bard's IVC filters were the safer and
9 more effective choice. Such insinuations are incorrect and misleading.

10 Further, admission of such testimony will inevitably lead to a "trial within a trial"
11 to address and rebut issues including: the definition of "gold standard" as it relates to
12 treatment for PE, DVT, and other conditions; whether all IVC filters are entitled to have
13 that designation; which brands or manufacturers' products constitute the "gold standard";
14 when did Bard's filters became the "gold standard", if they did at all; and whether Bard
15 or some other company's branding of its filters, as opposed to clinical experience,
16 resulted in the product's designation as the "gold standard" treatment for PE, DVT, and
17 other diagnoses. These "mini-trials" would be particularly wasteful, confusing to the jury,
18 and prejudicial to the Plaintiff. *Wilson v. Maricopa County*, 2007 WL 686726, at *12-13
19 (D. Ariz. Mar. 2, 2007) (finding that evidence that creates mini-trials leads to
20 unnecessarily lengthy trials for parties and jury and is precluded under Fed. Rule Evid.
21 403). Considering the time limits assigned to Ms. Booker's trial, it would be especially
22 unfair for Plaintiff to have to combat such assertions with the clock running. In addition,
23 the prejudicial impact of Bard's "gold standard" argument would be high, given the
24 possibility that the jury would simply assume that the G2 Filter constituted the best
25 treatment available for Ms. Booker's condition.

26 At the same time, as discussed above, evidence that IVC filters constitute the
27 "gold standard" or "standard of care" has little to no probative value; it has nothing to do
28 with whether the design of Bard's G2 filter was defective or its warnings were adequate

1 and also as evidenced by the ambiguous nature of the term. Thus, the prejudicial impact
2 far outweighs any probative value.

3 Based upon the foregoing, Plaintiff respectfully requests that Defendant be
4 precluded from introducing evidence or arguing that IVC filters are the “gold standard”
5 or the “standard of care” for treatment of patients.

6 RESPECTFULLY SUBMITTED this 26th day of January, 2018.

7 GALLAGHER & KENNEDY, P.A.

8
9 By: /s/ Mark S. O'Connor
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17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on this 26th day of January, 2018, I electronically transmitted
19 the attached document to the Clerk's Office using the CM/ECF System for filing and
20 transmittal of a Notice of Electronic Filing.

21 /s/ Gay Mennuti